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IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

MUTUAL RESERVE LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,
Plaintiff in Error,
vs.
PRISCILLA DOBLER,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF WASHINGTON, WESTERN DIVISION.

Brief of Plaintiff in Error.

GALUSHA PARSONS,
EDWARD L. PARSONS,
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ALLEN & LAMBORN PRINTING CO., over P. O., Tacoma.

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STATEMENT.

Defendant in error, Priscilla Dobler, sued upon a policy of assurance in the sum of ten thousand dollars, issued by plaintiff in error upon the life of Frederick C. Dobler, son of said Priscilla Dobler. There was a jury trial, verdict and judgment for plaintiff, and defendant brings error.

On the 20th day of October, 1902, said Frederick C. Dobler, made application in writing to the Mutual Reserve Life Insurance Company for a policy of assurance in the sum of $10,000. (Plaintiff's Exhibit B, Record, page 163.)

The application was taken by one William Hyde Stalker, a soliciting agent of the company. It contained, among others, the following provisions:

"Under no circumstances shall the assurance hereby applied for be in force or the company incur any liability hereunder until the actual payment in cash of the first premium, while I am in good health, in exchange for a receipt on the company's authorized form, signed by its treasurer, and then only in accordance with the terms of said receipt and after the application shall have been received by the company at its home office and a policy actually issued hereon."

On the 7th day of November, 1902, upon receipt of said written application and in accordance with the terms and conditions thereof, the company made out its certain policy of assurance, No. 1,004,047, and forwarded same to the agent, W. H. Stalker.

Said policy of assurance (Record, p. 152) contained, among others the following provisions:

"This policy of assurance witnesseth that in consideration of the application herefor, hereby made a part of this contract, and of three hundred and eighty-one dollars and eighty cents to be actually paid in cash as a first premium on or before the delivery hereof * * *"

"This policy shall not take effect until it is delivered to the assured in person, during his lifetime and while in good health, and the first payment made in cash, except where a binding receipt, signed by the treasurer of the company, is issued prior to such delivery, and then only in accordance with the terms of such receipt."

The policy provided that premiums might be paid one-third by annual premium note and balance in cash. It is conceded that no binding receipt, such as referred to in the policy, was ever issued.

Notwithstanding these provisions of the contract, the agent Stalker did deliver the policy to the assured without any part of the first premium being paid in cash, but taking two promissory notes therefor; one for one-third of the first premium, which he forwarded to the company, and one for the sum of $254.54 payable to and endorsed by the assured and left by said Stalker with the First National Bank of Baker City, Oregon, as collateral to a note made by himself. (Record, p. 67-8.)

No report of his action in this regard was ever made by said Stalker to the company or in any way made known to or ratified by the company. (Record, p. 105-106-111.)

The policy in express terms provided that no agent had authority to waive or modify any of its terms.

It appears that the note for $254.54 was paid by the assured to the bank, the final payment being made February 16, 1903. (Record, p. 88.)

The assured was killed in a snow slide March 3, 1903.

The following day the agent Stalker delivered to Mark T. Kady, the general agent of the company at Portland, a draft for $200 and certain promissory notes, on account of the net premiums on twelve policies, including the policy in suit. (Record, p. 181.)

Thereafter the agent Kady forwarded the $200 draft to the company at its home office in the city of New York, but without any statement as to what it was for or how it should be applied. (Record, p. 111.)

The policy was never credited with any payments upon the books of the company or in any way considered or recognized as in force by the company.

The company had no knowledge or notice that the agent Stalker had taken a note from said F. C. Dobler, on account of the first premium on this policy until about two weeks prior to his death, (Record, p. 111) when it received information tending to show that said Stalker might have taken notes on account of first premiums on certain policies solicited by him. It commenced an investigation to ascertain the facts in this regard but received no definite information until some time after Mr. Dobler's death.

The first defense to this action, therefore, was, that the policy had never taken effect nor become a binding contract for the reason that the same had not been delivered to the assured during his lifetime, while in good health, nor the first premium paid in cash according to the express terms of said policy and written application.

The written application made by said Frederick C. Dobler as aforesaid, further provided:

"I hereby agree that the answers and statements contained in parts I and II of this application, by whomsoever written, are warranted to be full, complete, material and true, and that this agreement, together with this application, are hereby made a part of any policy that may be issued hereon; that if any of the answers or statements made are not full, complete and true, or if any condition or agreement shall not be fulfilled as required herein or by such policy, then the policy issued hereon shall be null and void, and all money paid thereon shall be forfeited to the company; that the person soliciting or taking this application, and also the medical examiner, shall be the agents of the applicant as to all statements and answers in this application, and no statement or answers made or received by any person, or to the company, shall be binding on the company, unless such statements or answers be reduced to writing and contained in this application; that the principles and methods employed by the company in any distribution of surplus, apportionment of profits or costs belonging to any policy that may be issued hereunder are accepted and ratified by and for every

person who shall have or claim any interest in the contract. And I hereby expressly waive all provisions of law now existing or that may hereafter exist, preventing any physician from disclosing any information acquired in a professional capacity or otherwise, or rendering him incompetent as a witness in any way whatever, and for myself and for any other person accepting or acquiring any interest in such policy, authorize and request any such physician to testify concerning my health and physical condition. I further agree not to use alcoholic or malt liquors to excess, or habitually use opium, hydrate of chloral, or other narcotics (tobacco excepted); and that under no circumstances shall the assurance hereby applied for be in force or the company incur any liability hereunder until the actual payment in cash of the first premium, while I am in good health, in exchange for a receipt on the company's authorized form, signed by its treasurer, and then only in accordance with the terms of said receipt and after the application shall have been received and approved by the company at its home office and a policy actually issued hereon.

"And I further expressly warrant that I have read the questions and answers contained in this application in parts I and II hereof, and each and all of them, and that said answers and each and all of them are my answers.

"And I do further expressly warrant that I have not, nor has any one on my behalf, made to the agent or medical examiner, or to any other person, any answers to the questions contained in this application other than or different from the written answers as contained in this application.

"And I do further expressly warrant that I have not, nor has any one on my behalf, given to the agent or medical examiner, or to any other person, any information or stated any facts, in any way contradictory of or inconsistent with the truth of the answers as written in this application in parts I and II hereof, and each and every one of the same, it being distinctly and specifically understood and agreed that the validity of any policy to be issued hereon is and shall be dependent upon the truth or falsity of the written answers contained in this application in parts I and II hereof, to the questions therein propounded."

In and by said written application said Frederick C. Dobler in response to the following questions made the following answers:

Q. Have you now any assurance on your life? If so, where, when taken, for what amounts and what kinds of policies?

A. Name of company or association; date issued; amount. 5,000. Washington Life; combination bond; May, 1900; 5,000.

Q. Have you any other assurance?

A. None.

(Record, p. 164.)

It was claimed by the company that these answers were not full, complete and true, but that in truth and in fact at the time of making said written application said Frederick C. Dobler held and had other assurance, not mentioned or referred to by him, namely, a $5,000 policy in the Travelers Insurance Company and a $1,000 policy in the same company.

It is admitted (Record, p. 100) that at the time of making said written application said Frederick C. Dobler held and had the $5,000 policy in the Travelers Insurance Company, (defendant's exhibit 1, Record, p. 189), and that said policy was in no way mentioned or referred to in the application for the policy here in suit.

It is contended by the company that the failure of said Frederick C. Dobler to make disclosure of all of the assurance held by him at the time of making said written application, was, by the express terms of the contract, a breach of warranty voiding the policy. That this conclusion, as matter of law, necessarily follows from the admitted facts.

To avoid this conclusion the lower court permitted plaintiff to show, by the testimony of the witness Stalker, that he, Stalker, assisted deceased in the preparation of the application, instructed him as to the answers called for by the questions contained in the application and informed him what the correct answers to such questions would be; that deceased told Stalker that he was carrying $5,000 accident insurance in the Travelers Insurance Company, and also $1,000 accident insurance in another company, and that Stalker told deceased that a disclosure of these policies was not called for; (Record, p. 75-76-126); that it was understood between Stalker and deceased that the answers contained in the written application were full, true and complete answers to the respective questions; that there was no disposition upon the part of Mr. Dobler to conceal anything; that he, Stalker, could not see and cannot see why the accident insurance carried by Mr. Dobler would affect the issuing of the policy in question. (Record, p. 127.)

Defendant contends that this evidence was inadmissible for any purpose, either to contradict the written contract or to create an estoppel, and that the action of the lower court in admitting it was error.

In and by said written application said Frederick C. Dobler made the following answers to the following questions:

In part I of the application, Record, p. 165.

Q. When did you last consult a physician and for what reason?

A. Do not remember, years ago.

Q. Give name and address of last physician consulted?

A. (No answer.)

In part II of the application, Record, p. 172.

Q. How long since you last consulted, or were attended by a physician? Give date?

A. Do not remember; long time ago.

Q. State name and address of such physician?

A. (No answer.)

Q. For what disease or ailment?

A. (No answer.)

Q. Give name and address of each and every physician who has prescribed for or attended you within the past five years, and for what disease or ailment and date?

A. (No answer.)

Q. Have you had any illness, disease or medical attendance not stated above?

A. (No answer.)

It is contended by plaintiff in error that these answers were not full, complete and true, but that in truth and in fact said Frederick C. Dobler had, within the five years immediately preceding the date of said application, at frequent intervals consulted a physician, and that his failure to make full disclosure of the facts in that regard was, by the express terms of the contract, a breach of warranty voiding the policy.

The evidence in this regard is embodied in the proofs of death submitted by plaintiff to defendant company (Record, p. 201-202), and in the deposition of Dr. W. T. Phy, a witness for plaintiff. (Record, p. 90 to 95.)

In the proofs of death (Record, p. 202) Dr. Phy swore that he had prescribed for deceased at intervals for five years.

In his deposition, testifying as a witness for plaintiff, Dr. Phy swore that he never consulted or attended deceased for any ailment or disease; that he was an intimate friend of deceased and in conversation with him mentioned to him the advisability of persons in general having frequent physical examinations by their physicians as a matter of precaution; that he made several physical examinations of deceased, including examinations of his urine, and at no time found any physical ailment; never prescribed any medicine for him; did on several occasions advise him concerning hygienic measures which any one should follow to preserve their health; never made any charge for these examinations. That within his knowledge said Frederick C.

Dobler was never afflicted with any disease or ailment. That he made physical examinations of said Frederick C. Dobler at frequent intervals during the last five years of his life; examined his heart, lungs and urine; that such examinations were made in his office at Mr. Dobler's request.

The questions which plaintiff in error presents to this court are:

1. Was the parol evidence of the witness Stalker admissible to vary, modify and contradict the written contract, or to create an estoppel?

2. Under the terms and conditions of this particular contract was there a breach of warranty by the assured in failing to make disclosure of the $5,000 policy in the Travelers Insurance Company held by him?

3. Under the terms and conditions of this particular contract was there a breach of warranty by the assured in failing to make disclosure of his consultations with a physician?

ASSIGNMENT OF ERRORS.

1. The court erred in admitting in evidence that portion of the testimony of the witness William H. Stalker, as follows:

Interrogatory 19. Did you assist Frederick C. Dobler in the preparation of said application; if so, how?

A. I did. I instructed him as to the answers called for by the questions contained in the application on information furnished me by him, and informed him that the correct answers to such questions would be, on the information given me.

2. The court erred in admitting in evidence that portion of the testimony of the witness William H. Stalker, as follows:

Interrogatory 22. Referring to question 10 in said application part I, were you aware and informed by Frederick C. Dobler at the time of preparing the application mentioned, that he, the said Frederick C. Dobler, was carrying $5,000 accident insurance in the Travelers Insurance Company of Hartford, Connecticut, state fully?

A. I was. He told me he was carrying $5,000 accident insurance in the Travelers Insurance Company of Hartford, Connecticut, and he also called my attention to a policy for $1,000 accident insurance that he carried in another company (the name of which I do not remember.) I was also aware of the fact that he carried $5,000 in the Washington Life of New York; he took particular pains to explain to me all his business affairs in connection with insurance. I told him that the $5,000 accident insurance likewise the $1,000 accident policy was not called for in answer to question 10 in application of Mutual Reserve Life Insurance Company.

3. The court erred in admitting in evidence that portion of the testimony of the witness William H. Stalker, as follows:

Interrogatory 23. If your answer to the preceding interrogatory discloses that you wrote in the answers in the application part I, state whether or not it was understood between you and the said Frederick C. Dobler that the answers so written in by you were full, true and complete answers to the respective questions according to the information given you by said Frederick Dobler?

A. It was so understood between Mr. Dobler and myself. There was no disposition upon the part of Mr. Dobler to conceal anything, neither was there on my part, because I could not see and cannot see now, why the accident insurance carried by Mr. Dobler would affect the issuing of the policy in question.

4. The court erred in denying defendant's motion, made after the close of the evidence: To direct a verdict for the defendant on the ground that it appears by the undisputed evidence that in the application for the policy in question there were two distinct breaches of warranty; first, as to other insurance held by the applicant at the time the application was made; and second, as to the applicant having consulted a physician .

5. The court erred in giving to the jury the following instruction: The defendant defends on the ground that Frederick C. Dobler committed a breach of warranty in that he did not make full, true and complete answers to the question numbered ten in part one of the application, which question is in these words: "Have you now any assurance on your life? If so, where, when taken, for what amount and what kind of policies?

Have you any other assurance?'' To which Mr. Dobler made this answer: ''$5,000; Washington Life. May, 1900. Amount, $5,000. Combination bond. None.'' Defendant claims that this answer was not full, complete and true, in that Mr. Dobler was carrying at that time a $5,000 accident policy in the Travelers Insurance Company of Hartford, Connecticut, and also another $1,000 policy. Well, it is admitted by plaintiff that Frederick C. Dobler was carrying a $5,000 accident insurance policy, in the Travelers Insurance Company of Hartford, Connecticut, and it is also claimed by defendant that he was carrying an additional $1,000 accident policy, which fact is disputed by the plaintiff here. In determining the question whether or not this answer was full, complete and true within the meaning of this application, you will take into consideration the circumstances surrounding the parties at the time the application was signed; any discussion that then took place between the deceased and the agent of the defendant company as to the meaning of the question asked, ''Have you any assurance on your life,'' and if you find from the evidence that a doubt might reasonably and fairly be entertained as to whether this question called for disclosure of any purely accident insurance that Mr. Dobler then carried, and that Mr. Dobler understood that it did not call for the disclosure of purely accident insurance, but only called for the disclosure of life insurance; and if such was the understanding of the defendant's agent at that time soliciting the insurance and receiving the application, then you may conclude this answer to this question was full, complete and true, and you will consider the evidence no further.

6. The court erred in giving to the jury the following instruction:

The defendant further defends on the ground that Mr. Dobler committed a breach of warranty in that he did not make full, true and complete answers to question thirteen, in part one of the application, and to question fourteen in part two of the application. Question thirteen, in part one, is as follows: "When did you last consult a physician and for what reason?" To which Mr. Dobler answered: "Don't remember, years ago." Question fourteen in part two is as follows: "How long since you consulted, or were attended by a physician? Give date." To which Mr. Dobler answered: "Don't remember, long time ago." You are instructed that these questions called for a disclosure of any and all those instances, if any, in which Mr. Dobler, the deceased, had consulted or been attended by a physician for some disease or ailment that he had, or supposed that he had; and unless the evidence in the case is such as to show that he had consulted or been attended by a physician for some ailment which he had or supposed he had, you are instructed that those answers to those questions are full, true and complete, and you may disregard that evidence.

7. The court erred in refusing to give to the jury the following instruction requested by the defendant:

It is admitted that at the time of the making of the written application in question by said Frederick C. Dobler, said Frederick C. Dobler held the policy of insurance in the Travelers Insurance Company for five thousand dollars, here in evidence. You are instructed that said policy in the Travelers Insurance Company constituted other assurance within the terms and meaning of the written application and policy sued upon.

ARGUMENT.

In considering the questions presented in this case we must keep clearly before us the terms and conditions of the contract. The contract consists of the written application and the policy. In the application the assured made the following answers to the following questions:

Q. Have you any assurance on your life? If so, where, when taken, for what amount, and what kinds of policies?

A. Name of company or association: 5,000; Washington Life. Date issued, May, 1900. Amount, $5,000. Combination bond.

Q. Have you any other assurance?

A. None.

It is admitted that at the time of making this application the assured had and held, in full force and effect, the $5,000 policy of assurance in the Travelers Insurance Company (Defendant's Ex. 1, Record, p. 189) and that the same was in no way mentioned or referred to in said written application.

It is contended by plaintiff in error that the failure of assured to make disclosure of this $5,000 policy so held by him, was, by the express terms of the contract, a breach of warranty voiding the policy.

But, it is contended, while it is true that deceased held this $5,000 policy in the Travelers; while it is true that no mention or disclosure thereof was made in the application; still deceased *told the agent Stalker all about it at the time.* In other words,

the written contract is not the contract from which the rights and liabilities of the parties must be determined, but it is competent to show by parol an entirely different contract.

By the terms of the written contract the assured agreed: that the answers and statements contained in the application were warranted to be full, complete, material and true; that if any of said answers and statements were not full, complete and true the policy should be void; that the person soliciting the application should be the agent of the applicant; that no statement or answers made or received by any person, or to the company, should be binding on the company unless the same were reduced to writing and contained in the application; that he had read the questions and answers contained in the application, and each and all of them, and that they were his answers; that he expressly warranted that he had not, nor had any one in his behalf, made to the agent any answers to the questions contained in the application other than or different from the written answers; that he expressly warranted that he had not given to the agent any information or stated any fact in any way contradictory of or inconsistent with the truth of the answers as written in the application, it being distinctly and specifically understood and agreed that the validity of any policy to be issued thereon should be dependent upon the truth or falsity of said written answers.

In the face of these provisions of the contract the lower court permitted defendant in error to show by the testimony of the witness Stalker, that he, Stalker, was aware and informed by Frederick C. Dobler at the time of making the application, that said Dobler was carrying $5,000 accident insurance in the Travelers; that said Dobler took particular pains to explain all

his business affairs in connection with insurance; that witness told Mr. Dobler that the $5,000 accident insurance was not called for in answer to the questions contained in this application. (Record, p. 75-76.) That it was understood between witness and Mr. Dobler that the answers written in the application were full, true and complete answers to the respective questions according to the information given witness by said Dobler; that there was no disposition upon the part of Mr. Dobler to conceal anything, neither was there on the part of witness; that witness could not see and cannot see now why the accident insurance carried by Mr. Dobler would affect the issuing of the policy in question. (Record, p. 126-127.)

It is admitted that none of these matters were in any way communicated to or made known to the company. (Record, p. 79.)

We submit, that in permitting this testimony to be introduced and to go to the jury the court erred. If it was error, that it was prejudicial error will hardly be questioned.

Bearing in mind always, the terms of the contract, and the fact that these provisions were contained in the *application*, which was the inception and basis of the contract and upon the faith of which the policy was issued by the company; wherein this case must be distinguished from those cases where no limitation of the powers of the agent is brought to the notice of the assured.

Bearing these things in mind: Was parol evidence admissible in direct, flat contradiction of the written contract? Should the parol evidence above referred to have been permitted to go to the jury?

If the provisions of the written contract are to be given any effect it must be conceded that the parol evidence should not have been admitted.

The question of the force, effect and interpretation of these and similar provisions in insurance contracts has been repeatedly before our courts. The decisions have been far from harmonious, but, we take it, two things are now finally determined. They are:

First. It is competent for an insurance company to limit and restrict the powers of its agent as they were limited by the terms of this application.

Second. Where the powers of the agent are limited as they were in this case, and where such limitation is brought to the notice of the assured at the inception of the contract, as it was in this case, parol evidence of what was said between the agent and the applicant is not admissible to vary or contradict the written contract or to create an estoppel.

It is a fundamental rule of law that parol contemporaneous evidence is inadmissible to vary or contradict the terms of a written contract.

It is manifest that the parol evidence so admitted in this case was directly, flatly contradictory of the written contract. By the terms of the written contract the assured agreed that no statements or answers made or received by any person, or to the company, should be binding on the company unless the same were reduced to writing and contained in the application; that he had read the questions and answers contained in the application, and each and all of them, and that they were his answers; that he

expressly warranted that he had not, nor had any one in his behalf, made to the agent any answers to the questions contained in the application other than or different from the written answers; that he expressly warranted that he had not given to the agent any information or stated any fact in any way contradictory of or inconsistent with the truth of the answers as written in the application.

To hold that this parol evidence is admissible is to hold that these terms of the written contract are a nullity.

To attempt to review the great mass of decided cases upon the question of the effect of provisions and agreements in an insurance contract similar to those contained in this contract, would be a formidable task. Fortunately it has been performed by abler hands than ours and the Supreme Court of the United States has, in a manner which leaves no room for discussion, established the principles that are decisive of this branch of this case.

These precise questions were presented in the case of *Northern Assurance Company vs. Grand View Building Association*, 183 U. S., 308. In view of the conflict among the decided cases and in order to finally settle the law the Supreme Court saw fit to have that case brought before it by writ of certiorari.

It was an action upon a fire insurance policy. The defense was other assurance existing at the time the policy issued. The policy provided that it should be void if the insured then had or should thereafter procure other insurance. It was admitted that the insured did have other insurance at the time the policy

in suit was written. The policy also provided that no agent had power to waive any of its terms unless such waiver was written upon or attached to the policy.

The trial court permitted plaintiff to show by parol that the agent of the insurer was informed and had knowledge of the subsisting insurance at and before the delivery of the policy in suit.

The opinion of the court covers fifty-seven pages of the report, embodying an exhaustive discussion of the rules of law applicable and an analysis of the leading cases in point.

It starts (page 318) with the elementary rule that parol evidence is inadmissible to vary or contradict a written instrument, and reviews the English cases holding the rule applicable to insurance contracts.

At page 321 it says:

"Coming to the decisions of our own state courts, we find that, while there is some contrariety of decisions, the decided weight of authority is to the effect that a policy of insurance in writing cannot be changed or altered by parol evidence of what was said prior or at the time the insurance was effected; that a condition contained in the policy cannot be waived by an agent, unless he has express authority so to do, and then only in the mode prescribed in the policy; and mere knowledge by the agent of an existing policy of insurance will not affect the company unless it is affirmatively shown that such knowledge was communicated to the company."

It cites, quotes from and discusses cases upholding these principles from the states of Massachusetts, Vermont, Rhode Is-

land, Michigan, Connecticut, New York, New Jersey and Pennsylvania.

At page 327 the court refers to certain New York cases which seem to depart from these principles, and then proceeds to demonstrate the fallacy thereof.

It cites with approval and quotes at length from the leading case of *Jennings vs. Chenango County Mutual Insurance Co.*, 2 Denio, 75, where the following language is used (page 331):

"To except policies of insurance out of the class of contracts to which they belong, and deny them the protection of the rule of law that a contract which is put in writing shall not be altered or varied by parol evidence of the contract the parties intended to make, as distinguished from what appears, by the written contract, to be that which they have in fact made, is a violation of principle that will open the door to the grossest frauds. * * * A court of law can do nothing but enforce the contract as the parties have made it. The legal rule that in courts of law the written contract shall be regarded as the sole repository of the intentions of the parties, and that its terms cannot be changed by parol testimony, is of the utmost importance in the trial of jury cases, and can never be departed from without risk of disastrous consequences to the rights of the parties."

At page 332 it quotes at length and with approval from the case of *Dowces vs. Manhattan Insurance Co.*, 35 N. J. L., where the rule and the reason of the rule, that parol evidence is inadmissible, is clearly laid down.

At page 337 it says:

"In Pennsylvania it has always been held that courts of law will not permit the terms of written contracts to be varied or altered by parol evidence of what took place at or before the time the contracts were made, and that policies of insurance are within the protection of the rule.

"Thus, when it was stipulated in the conditions of insurance that a false description of the property insured should avoid the policy, it was held that a misdescription defeated plaintiff's right to recover under it, though the statements were known to be false by the insurer's agent, who prepared the description, and informed the plaintiff that in that respect the description was immaterial.

"In *Com. Mut. Fire Ins. Co. vs. Huntzinger*, 98 Pa., 41, the subject was examined at length and the previous cases considered, and it was held that mere mutual knowledge by the assured and the agent of the falsity of a fact warranted, is entirely inadequate to induce a reformation of the policy, so as to make it conform to the truth; that it is rather evidence of guilty collusion between the agent and the assured, from which the latter can derive no advantage."

At page 340 commences a review of the decisions of the Federal Courts upon these questions. It finds that the Circuit Court of Appeals for the Seventh circuit has held consistently to the rule as heretofore indicated, while the Circuit Court of Appeals for the Eighth circuit, in the case under consideration, has applied the view that a written contract may, in an action at law, be changed by parol evidence.

At page 341 the court says:

"In such divergence of decisions, we have deemed it proper to have the present case brought before us by a writ of certiorari.

"As to the fundamental rule, that written contracts cannot be modified or changed by parol evidence, unless in cases where the contracts are vitiated by fraud or mutual mistake, we deem it sufficient to say that it has been treated by this court as invariable and salutary. The rule itself and the reasons on which it is based are adequately stated in the citations already given from the standard works of Starkie and Greenleaf.'

"Policies of fire insurance in writing have always been held by this court to be within the protection of this rule."

Then follows a consideration of the earlier cases in that court.

At page 358 it quotes at length from the case of *New York Life Insurance Co. vs. Fletcher*, 117 U. S., 519, a leading case. It was an action upon a life insurance policy, practically on all fours with the case at bar. It clearly lays down the rules as here contended for, namely, that it is competent for the company to limit the powers of the agent; and where the powers of the agent are limited, where the terms of the application are such as they are in the case at bar, the applicant is bound by his written application and parol evidence of what was said between the applicant and the agent is not admissible.

The terms of the application in the Fletcher case were very like those in this case.

At page 361 the court says:

"What, then, are the principles sustained by the authorities, and applicable to the case in hand?

"They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in cases of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by endorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing endorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeitures caused by non-observance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that

occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is the act of an agent, it must be shown, either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

Upon the question of the admissibility of this parol evidence further argument or citation of authorities seems unnecessary. The Supreme Court, in the cases above referred to, has exhausted the subject.

The reason of the rules excluding parol evidence in such cases applies with special force to life insurance contracts. In the nature of things there would be but two persons who could know anything about it—the assured and the agent. The assured being dead, is the formal written contract to be varied or contradicted by the parol testimony of the agent, the only living person who could possibly testify and whose word would be beyond possibility of contradiction? Is the written contract to be disregarded and a new contract created from the parol testimony of this one man? Is his unsupported word to control? He might be mistaken. He might have forgotten. He might not have correctly understood what was said. He might not tell the truth. *Suppose it was the insurance company that was offering this kind of evidence.*

But let us see upon what grounds the lower court based its ruling. In finally passing upon this question it said:

"There is undoubtedly grave apparent conflict in the decided cases as to the true rule covering this question; but, after con-

siderable thought on the matter, I have reached the conclusion that in this particular case what took place between the agent and the assured at the time this application was made may be properly received in evidence. It is part of the *res gestae*. It shows the circumstances under which the application was made and the particular interpretation which was placed by the parties at the time upon this provision found in the application in regard to other insurance. Now, if it were perfectly plain and clear that the answer to that question required the applicant to disclose the fact that he had the accident policy mentioned, then this testimony would not be relevant; but it is not clear. The phrase itself is an ambiguous one. It may call for the disclosure or it may not. It is broad enough; it might be understood by the parties as calling for such disclosure, and, on the other hand, it may be understood by the parties as not calling for such disclosure. Now, the Supreme Court of the United States, in the case of *Continental Insurance Company vs. Chamberlain*, 132 U. S., say that the purport of the word insurance, in the question, has the same party any other insurance on his life, is not so absolutely certain as in an action upon that policy to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was asked. Now, if that is the rule, a presumably reasonable one, to apply to this case, it is broad enough to permit the answer to the question as to what was said by the insurance agent in relation to the answers to be made to that question. Then let us go further, and consider that when the application was made, when it was completed, the matter of receiving it was the act of the agent of the company, and when it was transmitted to the defendant, going as it did with the construction which he and the assured placed upon it, and

when he accepted the money of the assured, the assured supposed he was making a full and complete answer to this question; I think that the company ought to be estopped from insisting upon a literal interpretation of the answer to that question. In other words, that it should be held to give it the same interpretation given it by its own agent at the time. Now, the court in this case (*Cont. I. Co. vs. Chamberlain*, 132 U. S.) say "The purport of the word in the question has the said party any other insurance on his life, is not so absolutely certain as in an action upon that policy as to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was asked. Such proof does not necessarily contradict the written proof. It simply explains it. It brings to the attention of the court and the jury what the parties meant in the use of the particular language which is under consideration. Of course, I may be in error as to this, but that is the conclusion that I have reached, and the ruling will be in accordance with that conclusion, and the defendant may have an exception to the ruling, so that it may be reviewed by a higher court."

The reasoning of the lower court in admitting this parol evidence, therefore, was: That it was competent to *explain* the written contract and to show the interpretation placed upon it *by the parties.*

By the parties necessarily means, by the assured in person and the insurer acting through the agent Stalker.

Which brings us squarely back to our starting point, and presents the question: Was it competent for the company to so limit the powers of the agent that he would have no power to

act for or bind the company in this regard? If it was, and if his powers were so limited: Who were the *parties* to this interpretation of the contract? In what way was the company a party thereto?

It seems to us, if your Honors please, that in its ruling upon this point the lower court overlooked the very essence of the question. It *assumed* that the action of the agent Stalker was the action of the company; that what was said to or by him was binding upon the company; that his "interpretation" of the contract might be shown as the interpretation of the company.

And this in the face of the positive terms of the contract. The contract expressly limited the powers of the soliciting agent; it provided that in the preparation of the application he *should not* represent the company; it provided that no statements or answers made to or received by any person should be binding on the company unless the same were reduced to writing and contained in the application; the applicant expressly warranted that he had read the questions and answers and that the answers were his answers; that he had not nor had anyone in his behalf made to the agent or to any other person any answers other than or different from the written answers; that he had not, nor had anyone in his behalf, given to the agent or to any other person any information or stated any facts in any way contradictory of or inconsistent with the truth of the answers as written.

In the face of these provisions of the contract, in the face of the rule as laid down by the Supreme Court that these provisions are customary, reasonable and binding upon the applicant, the lower court permitted parol evidence to be introduced to show that the written answers were not the answers, that the

applicant had given the agent other and different answers, that he had given the agent other information and stated different facts. This parol evidence was directly contradictory of the written contract, and was received, as, it was said, showing the *interpretation* of the contract at the time *by the parties.*

We repeat: Under the terms of the contract, *in what way was the company a party to this interpretation?*

As the basis of the contract the company required a written application from the applicant. It wanted and required the statement of the *applicant.* It did not want a statement, or an "interpretation" of the contract by an agent. Therefore, the provisions above referred to were inserted in the application.

Can it be that there is no possible way in which an insurance company can protect itself? Can it be that where such company insists upon a written statement from the applicant as the basis of a contract; that where the applicant is expressly notified that the agent has no power to act for the company in the preparation of that written statement; that where a written contract such as the written contract sued on in this case is made; that its express terms can be disregarded, wiped out and nullified?

In support of its ruling upon this point the lower court cited the case of *Continental Insurance Company vs. Chamberlain*, 132 U. S., 304.

We think the court overlooked the obvious and vital distinctions between that case and the case at bar.

In the case at bar it must be conceded that, if the express

terms of the contract are of any effect, the act of the agent in filling in the application was not the act of the company; that for that purpose he was not the agent of the company.

The Chamberlain case was decided under a statute of the state of Iowa, which provides:

"Any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, *anything in the application or policy to the contrary notwithstanding.*"

Under this statute the court held that the act of the agent in filling in the application was the act of the company and that the company was bound by his acts. That, therefore, parol evidence of what was said between the applicant and the agent was admissible to show what kind of insurance the parties had in mind at the time. But the decision was based absolutely upon the fact that the agent was the agent of the company for that purpose, being made so by the *express terms of the statute.*

That is an entirely different case from the case at bar.

We, therefore, submit: That the action of the lower court in admitting the parol evidence objected to was prejudicial error necessitating a reversal of the judgment.

In view of the exhausive discussion of this question by the Supreme Court of the United States in the cases hereinbefore referred to further argument seems unpardonable; but see:

Dimick vs. Metropolitan Life Ins. Co., 55 Atl., 291.

Hubbard vs. Mutual Reserve Fund Life Assn., 80 Federal, 681-4.

Maier vs. Fidelity Mut. Life Assn., 78 Federal, 566.

The opinion in this case clearly points out the distinction heretofore made between the case at bar and the case of *Continental Insurance Co. vs. Chamberlain,* 132 U. S., 304, cited by the lower court to sustain its ruling.

Liverpool & L. & G. Ins. Co. vs. Richardson Lumber Co., 69 Pac., 938.

Sun Fire Office vs. Wich, 39 Pacific, 587.

The court erred in denying defendant's motion, made after the close of the evidence; to direct a verdict for the defendant on the ground that it appears by the undisputed evidence that in the application for the policy in question there were two distinct breaches of warranty; first, as to other assurance held by the applicant at the time the application was made; and, second, as to the applicant having consulted a physician. (Record, pp. 127-128.)

Under the rules of law established by the Supreme Court of the United States in the cases hereinbefore referred to, it is manifest that parol evidence was inadmissible to vary or contradict the written contract or to create an estoppel; therefore, the rights of the parties must be determined from the written contract. It is equally manifest that the construction of that contract was a question of law for the court.

In the application the assured made the following answers to the following questions:

Q. Have you any assurance on your life? If so, where, when taken, for what amount, and what kinds of policies?

A. Name of company or association: 5,000; Washington Life. Date issued, May, 1900. Amount, $5,000. Combination bond.

Q. Have you any other assurance?

A. None.

We would call particular attention to the form of these questions. He was first asked: "Have you any assurance on your life?" To which question he made the answer above quoted. He was then asked: "*Have you any other assurance?*" To which he answered: "*None.*"

It is admitted that at that time he had in full force and effect the $5,000 policy in the Travelers Insurance Company. (Defendant's Ex. 1, Record, p. 189.)

In and by said written application the assured made the following answers to the following questions:

Q. When did you last consult a physician, and for what reason?

A. Do not remember, years ago.

Q. Give name and address of last physician consulted.

A. (No answer.)

Q. How long since you last consulted, or were attended by a physician, give date?

A. Don't remember; long time ago.

Q. State address and name of such physician?

A. (No answer.)

Q. For what disease or ailment?

A. (No answer.)

Q. Give name and address of each and every physician who has prescribed for or attended you within the past five years, and for what disease or ailment and date.

A. (No answer.)

Q. Have you had any illness, disease or medical attendance not stated above?

A. (No answer.)

The only evidence in relation to assured having consulted a physician is contained in the proofs of death and in the deposition of Dr. Phy.

Dr. Phy made the "Attending Physician" affidavit in the proofs of death. In answer to the following question therein he made the following answer:

Q. When did you first attend or practice for deceased, and for what?

A. Prescribed at intervals for five years.

His deposition is in the record, pages 90 to 95.

By the terms of the application the applicant agreed: that the answers and statements contained in the application were warranted to be full, complete, material and true; that if any of the answers or statements made were not full, complete and true, then the policy issued thereon should be null and void and

all moneys paid thereon forfeited to the company; it being distinctly and specifically understood and agreed that the validity of any policy issued thereon should be dependent upon the truth or falsity of the written answers contained in the application.

Under this contract and in view of the admitted facts and undisputed evidence, we submit, that the lower court erred in denying defendant's motion for a directed verdict.

We presume it will be conceded that the parties to a contract may, by their contract, make any fact material which otherwise might not be deemed material.

It will, we take it, also be conceded, that it is a well settled rule of law that warranties in such a contract must be literally true.

The question, therefore, is: Does it appear from the admitted facts or the undisputed evidence that any of the warranties contained in this application were not literally true?

It is too apparent to admit of argument that the warranties in relation to other assurance were not literally true.

But, it will be argued, this policy in the Travelers was accident insurance, and the question did not call for a disclosure of accident insurance.

This simply brings us back to the *terms of the contract.* The applicant was asked: "Have you any assurance on your life?" If it had stopped there there might be room for the contention that a disclosure of the policy in the Travelers was not called for. But it did not stop there. He was then asked:

"*Have you any other assurance?*" To which he answered: "*None.*"

What did this question mean? It certainly meant something. It cannot be disregarded nor ignored. It was a material part of the contract. It was made material by the express terms of the contract. The applicant expressly warranted that his answer was full, complete and true. He expressly warranted that he had no other assurance. It is now admitted that he did have other assurance. It is admitted that he had a policy of assurance for $5,000 in the Travelers Insurance Company, which matured upon his death and under which the beneficiary, Priscilla Dobler, was paid the full sum of $5,000.

Under these admitted facts there was presented the question of law: Was the answer to this question full, complete and true; was it literally true? If it was not plaintiff could not recover in any event and the court should have directed a verdict for the defendant.

The case of *Northern Assurance Co. vs. Grand View Building Association*, 183 U. S., 308, heretofore referred to, is, it seems to us, decisive of this question. In that case the court began its opinion by saying (page 317):

"Over insurance by concurrent policies on the same property tends to cause carelessness and fraud, and hence a clause in the policies rendering them void in case other insurance had been or should be made upon the property and not consented to in writing by the company, is customary and reasonable.

"In the present case, such a provision was expressly and in unambiguous terms contained in the policy sued on, and it was

shown in the proofs of loss furnished by the insured, and it was found by the jury, that there was a policy in another company outstanding when the present one was issued.

"It is also made to appear that no consent to such other insurance was ever endorsed on the policy or added thereto.

"*Accordingly it is a necessary conclusion that by reason of the breach of the condition the policy became void and of no effect, and no recovery could be had thereon by the assured unless the company waived the condition. The question before us is reduced to one of waiver.*"

It then proceeds to demonstrate that such waiver could not be established by parol evidence of what was said between the agent and the insured at the time the policy was written.

In the case at bar the existence of the other assurance is admitted. There was, therefore, no question for the jury in that regard.

In view of the great divergence of decisions in these insurance company cases the Supreme Court saw fit to have that case brought before it for the purpose of *settling the law*. It sought to lay down certain rules for guidance in the future. It sought by a final and authoritative decision, after a careful and exhaustive consideration, to conclusively establish a precedent.

It did settle the law; it did establish a precedent, which, applied to the admitted facts in this case must be conclusive.

The opinion in that case is quite long, we have already quoted from it at some length under a previous branch of this

argument. At page 361 the court summarizes the principles of law, which are, we think, decisive of this case. We have but to apply them to this case.

The contract was unambiguous. The applicant warranted his answers and statements to be full, complete, material and true; he agreed that if any answers were not full, complete and true the policy should be void, it being distinctly and specifically understood and agreed that the validity of the policy should be dependent upon the truth or falsity of such answers. There was certainly no ambiguity in those provisions of the contract.

He was asked: "Have you any assurance on your life?" His answer made no mention of the policy in the Travelers. He was then asked: *"Have you any other assurance?"* To which he answered: *"None."* It is equally certain there was no ambiguity here. They were plain, clear, direct questions and positive, unequivocal answers.

It is admitted that he then had the $5,000 policy in the Travelers Insurance Company, which matured upon his death and under which the beneficiary was paid the full sum of $5,000.

The contract speaks for itself; there is no room for construction; the courts can only enforce the contract which the parties have made. They cannot disregard nor ignore any of its terms, nor by construction create for the parties a contract which they did not make.

But the lower court in passing upon the question of the admissibility of parol evidence of what was said between the agent and the applicant, cited the case of *Continental Insurance Co. vs. Chamberlain*, 132 U. S., 304, as an authority to the effect

that these questions were not so absolutely certain and free from ambiguity as to preclude proof as to what the parties meant. We submit that the lower court overlooked the two obvious distinctions between the case cited and the case at bar, which are:

First. The questions were not the same. In the Chamberlain case the question was: "Has the said party any other insurance on his life?" In this case the questions were: "Have you any assurance on your life?" "*Have you any other assurance?*"

If there was any ambiguity in the first of these questions, if there was any doubt as to what was called for, it was certainly removed by the second. Can there be any possible doubt that the second of these questions called for a disclosure of a policy which matured upon the death of the applicant and under which the beneficiary was paid the full sum of $5,000?

Second. The Chamberlain case was decided under a statute of the state of Iowa, which provides: "Any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding."

Under this statute the court held that the agent was the agent of the company; that if at the inception of the contract, the parties thereto, the company represented by its agent and the assured in person, *agreed* that the question in that application did not call for a disclosure of the particular policies in question, the company would be estopped to thereafter say that it

did call for such disclosure; and that where the parties had so agreed that agreement was not necessarily so inconsistent with the terms of that particular contract as to preclude proof of what particular kind of assurance the parties had in mind at the time the question was answered.

That case rests entirely upon the fact that under the statute of the state of Iowa the agent is the agent of the company, anything in the contract to the contrary notwithstanding. It is a very different case from the case at bar.

The case at bar presents simply the question of the construction of this particular contract and whether the admitted facts show a breach of warranty.

The question reduced to its ultimate form seems simplicity itself. We have, the written contract, by which the statements and answers therein contained are agreed to be material and are expressly warranted to be full, complete and true, we have the questions: Have you any assurance on your life? Have you any other assurance? We have the answers thereto.

Query: Were these answers full, complete and true; were they literally true?

In the case of *Aetna Life Insurance Co. vs. David France*, 91 U. S., 510, the syllabus is as follows:

"1. Where an insurance policy contained the clause; that if the proposals, answers and declarations made by the insured should be in any respect false or fraudulent, then the policy should be void, and that any untrue or fraudulent answers should

render it void, all the statements contained in the proposal must be true or the policy will be void.

"2. The materiality of such statements is removed from the consideration of a court or jury, by the agreement of the parties that such statements are absolutely true; and if untrue in any respect the policy shall be void."

In the opinion the court quoted with approval from the case of *Jeffries vs. Insurance Company*, 22 Wallace, 47, as follows:

"Nothing can be more simple. If he makes any statement in the application, it must be true. If he makes any declaration in the application, it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company."

The opinion then proceeds:

"This decision is so recent and so precise in its application, that it is not necessary to go back of it. It is only necessary to reiterate that all the statements contained in the proposal must be true; that the materiality of such statements is removed from the consideration of a court or jury by the agreement of the parties that such statements are absolutely true, and that, if untrue in any respect, the policy shall be void."

That case was remanded for a new trial as there was a question of fact as to the truth or falsity of the statements. In the case at bar the facts in this regard are admitted, so there is no question for the jury.

The case of *Imperial Fire Insurance Co. vs. County of Coos*, 151 U. S., 452, is squarely in point. The policy was one of fire

insurance. Among other things it provided that it should be void if mechanics were employed in building, altering or repairing the premises. At page 462 the court said:

"It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provisions of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their functions and duty consist simply in carrying out the one actually made."

In the trial court the defendant moved for a directed verdict. At page 466 of the opinion the court said:

"This motion was denied by the court and the defendant excepted. Under the construction we have placed upon the last condition above quoted, we are of opinion that the defendant was entitled, on the conceded facts to have a verdict directed in its favor on the ground that the employment of mechanics to make such material alterations and repairs as were made, without the knowledge or consent of the plaintiff in error, was in and of itself such a violation of the terms of the policy as rendered it void, without reference to the question whether such alterations and repairs had increased the risk or not."

The case of *Dimick vs. Metropolitan Life Insurance Co.*, 55 Atl., 291, is directly in point and on all fours with the case at bar. The precise questions here presented were presented in that case. The defense was, other assurance. The terms of the contract were practically the same as in this case. In the application the

applicant was asked: "Is there any other insurance in force on your life?" To which he answered: "None." It was shown that he held a paid up policy for $219 in another company. The soliciting agent testified that at the time he prepared the application he was advised as to this paid up policy but did not consider it necessary to refer to it.

The court held, that this paid up policy was other insurance in force on his life; that the failure of assured to disclose same in answer to the question contained in the application was a breach of warranty voiding the policy; that the terms of the contract constituted a plain limitation of the powers of the agent and the fact that the applicant was mislead by the advice, ignorance or stupidity of this agent could not affect the contract which he made. The court reviews a great number of the earlier cases and is forced to the conclusion that the answer was not true, and, therefore, by the terms of the contract plaintiff could not recover.

In the case of *Delaware Insurance Co. vs. Greer*, 120 Federal, 916, the Circuit Court of Appeals for the Eighth circuit, said:

"Contracts of insurance, however, are not made by or for casuists or sophists, and the obvious meaning of their plain terms is not to be discarded for some curious, hidden sense, which nothing but the exigency of a hard case and the ingenuity of an acute mind would discover. Contracts of insurance, like other contracts, are to be construed acording to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken in their plain, ordinary and popular sense."

And in conclusion:

"The judgment below is accordingly reversed, and, as this case is here upon an agreed statement of facts the case is remanded to the Circuit Court with directions to enter a judgment upon the merits in favor of the insurance company, with costs."

In the case of *American Credit Indemnity Company vs. Carrollton Furniture Co.*, 95 Federal, 111, the Court of Appeals for the Second circuit used this language:

"But when there is a distinct agreement that the application is a part of the contract, and the statements in the application upon which the contract is based are expressly declared to be warranties, the intent of the assured to bind himself to exactness of truth in his answers, although the facts which are called for may seen not material, is clearly and adequately manifested, and the contract must be enforced according to its terms. Where the assertions or representations upon which the contract is declared to be based are warranties, they must be strictly true, or the policy will not take effect; and this is so whether the thing warranted be material to the risk or not. It would, perhaps, be more proper to say that the parties have agreed on the materiality of the thing warranted, and that the agreement precludes all inquiry into the subject."

In the case of *Kansas Mutual Life Ins. Co. vs. Pinson*, 63 S. W., 531, a misstatement of the ages of assured's sisters was held to be a breach of warranty forfeiting the contract.

In the case of *Metropolitan Insurance Co. vs. Rutherford*, 35 S. E., 361, it appeared that in his application the assured stated that his father died of cholera morbus; in the proofs of

death the beneficiary stated that assured's father died of fistula. The court said:

"Where the answers to questions propounded in an application for insurance are made warranties by the terms of the contract of insurance, its validity depends upon the literal truth of such answers, and it is a matter of no consequence whether they are material to the risk or not. Being warranties, they are in the nature of conditions precedent, and, like them, must be strictly complied with. The warranty being untrue the plaintiff cannot recover."

In the case of *Kiesey & Co. vs. Sun Fire Office*, 88 Federal, 243, the court, at page 246, said:

"In reaching this conclusion, we have not overlooked the customary appeal of counsel in insurance cases to the rule that, where the terms of a policy are ambiguous or of doubtful meaning, its words should be construed most strongly against the company. But it is equally well settled that, contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used; and, if they are clear and unambiguous their terms are to be taken in their plain, ordinary and proper sense."

In the case of *Webb vs. Security Mutual Life Ins. Co.*, 126 Federal, 635, in the Circuit Court of Appeals for the Eighth Circuit, the applicant had been asked whether any application to insure his life had been made on which a policy had not issued. He answered in the negative. It appeared that previously he had signed two parts of an application to another company, and had been partially examined by a medical examiner, but that he had

declined to complete the examination on the ground that he had been misinformed as to the character of the policy. In discussing the question the court said:

"An applicant for a policy has no right to fence with the truth in answering such an inquiry. He should meet it in good faith and according to its letter and spirit."

It was held that his failure to disclose the facts was a fatal breach of warranty voiding the policy.

See also:

New York Life Ins. Co. vs. Fletcher, 117 U. S., 519.

Maier vs. Fidelity Mut. Life Ass'n., 78 Federal, 566.

United States Life Ins. Co. vs. Smith, 92 Federal, 503-506.

Security Mutual Life Ins. Co. vs. Webb, 106 Fed., 808.

Liverpool & L. & G. Ins. Co. vs. Richardson Lumber Co., 69 Pac., 938.

Home Life Ins. Co. vs. Myers, 112 Fed., 846.

McClain vs. Provident Svs. & L. Soc., 105 Fed., 834.

Provident Svs. L. A. Soc. vs. Llewellyn, 58 Fed., 940.

Schultz vs. Mutual Life Ins. Co., 6 Fed., 672.

Leonard vs. State Mut. Life Ins. Co., 51 Atl., 1049.

Farrell vs. Security Mut. Life Ins. Co., 125 Fed., 684.

Jeffries vs. Economical Mut. Life Ins. Co., 22 Wallace, 47.

Fell vs. John Hancock Mut Life Ins. Co., 57 Atl., 175.

The rights of the parties to this action must be determined from the contract upon which plaintiff is seeking to recover. That contract must receive a fair, reasonable interpretation. Its express terms cannot be ignored nor can they be nullified by construction.

The applicant was asked: "Have you any assurance on your life?" If it had stopped there there might, under the rule that these contracts will be construed most strictly against the company, be room for the contention that a disclosure of the policy in the Travelers Insurance Company was not called for; that the answer was full, complete and true. But it did not stop there. He was then asked: "Have you any other assurance?" To which he answered: "None."

It being admitted that he then had the policy in the Travelers, which matured upon his death and under which the beneficiary was paid the sum of $5,000, is there any avoiding the conclusion that his answer to this question was not full, complete and true.

There remains for consideration the breach of warranty in the answers to the questions as to the applicant having consulted a physician.

In Part I of the application he made the following answers to the following questions: (Record, p. 165.)

Q. When did you last consult a physician and for what reason?

A. Do not remember, years ago.

Q. Give name and address of last physician consulted?

A. (No answer.)

In Part II of the application he made the following answers to the following questions: (Record, p. 172.)

Q. How long since you last consulted, or were attended by a physician? Give date.

A. Do not remember, long time ago.

Q. State name and address of such physician.

A. (No answer.)

Q. For what disease or ailment?

A. (No answer.)

Q. Give name and address of each and every physician who has prescribed for or attended you within the past five years, and for what disease or ailments, and date.

A. (No answer.)

Q. Have you had any illness, disease or medical attendance not stated above?

A. (No answer.)

The only evidence adduced upon the trial in this regard is contained in the proofs of death and in the deposition of Dr. Phy.

In the proofs of death Dr. Phy, who made the attending physician affidavit, stated that he *prescribed* for the deceased at intervals for five years. (Record, p. 202.)

Dr. Phy's deposition was taken as a witness for plaintiff and read at the trial. (Record, p. 90-95.) He testified that he never

attended deceased for any disease and never prescribed any medicine for him, but had on several occasions advised him concerning hygienic measures, and that at frequent intervals during the last five years of his life he made thorough physical examinations of deceased: that he examined his heart, lungs and urine: that such examinations were made in his office at Mr. Dobler's request.

What has been said under the previous branches of this argument is equally applicable here. And it must be borne in mind that the information sought by these questions was of the first importance to the company. At the inception of the contract the company wanted all of the information obtainable as to the health and physical condition of the applicant. It wanted to know whether he was in any way diseased; it wanted to know what physicians had attended him; it wanted to know what physicians he had *consulted;* it wanted to know for what reason he had consulted them; if he had consulted any physician, if any physician was familiar with his health and physical condition, it wanted to know who that physician was.

It appears that during the last five years of his life deceased had at frequent intervals consulted Dr. Phy and that upon each of these occasions Dr. Phy had made a thorough examination as to his physical condition, including examination of his heart, lungs and urine. Knowledge of this fact was of the first importance to the company. Here was a source from which the company could obtain information of great value to it. This source of information was kept from it, concealed from it, by the applicant. He was asked: When did you last *consult* a physician and for what *reason?* It was not when he had been

attended by a physician: it did not imply that such consultation had been with regard to any disease or ailment. It was simply, when did you last *consult* a physician, for what reason, no matter what the reason was, and who was the physician.

Were his answers to these questions full, complete and true? It is manifest that they were not. But, it will be argued, he had not been attended by nor did he consult a physician for any disease or ailment.

It is this particular contract that we are considering, this particular question and this particular answer, in view of the undisputed evidence. This case must be distinguished from those cases where questions are asked which in any way call for an expression of opinion by the applicant or where the form of the questions imply that the consultation was with regard to some disease or ailment. The first of these questions, contained in Part I of the application, certainly did not imply any such thing. He was not asked when he had been attended by a physician, it was: When did you last *consult* a physician, and for what *reason?*

The question called for a certain, definite *fact;* there was no room for the exercise of judgment, no opinion was called for and there was no possibility of misunderstanding. By the terms of the contract it was made material, it was, in fact, of the first importance: it was warranted to be full, complete and true.

In the case of *Cobb vs. Covenant Mutual Benefit Ass'n.*, 26 N. E., 230, the Supreme Court of Massachusetts said:

"While the question whether Cobb had a fixed disease, and what the disease was, might be an inquiry involved in considerable embarrassment, the question whether he had consulted a

physician, or had been professionally treated by one, was simple, and one about which there could be no misunderstanding. Had it been replied to in the affirmative, the answer would have led to other inquiries. Indeed, the question which follows is, 'If so, give dates, and for what disease.' It is upon the existence of this latter question that the plaintiff founds an argument that it was necessary to show that Cobb had some distinct disease permanently affecting his general health before it could be said that he answered this question untruthfully. But the scope of the question cannot be thus narrowed. Even if Cobb had only visited a physician from time to time for temporary disturbances, proceeding from accidental causes, the defendant had a right to know this, in order that it might make such further investigation as it deemed necessary. By answering the question in the negative, the applicant induced the defendant to refrain from doing this. In *Insurance Co. vs. McTague*, 49 N. J. Law, 587, 9 Atl. Rep., 766, it was held that where the applicant stated that he had not consulted a physician, or been prescribed for by one, and such statement was shown to have been false by proof of a prescription received, there could be no recovery, although it appeared to have been given for a cold. The court say: 'The representation did not aver a condition of health, or that it was requisite or proper to consult a physician. It avered that he had not consulted a physician, or been prescribed for by a physician. The fact found contradicted this averment whether the consultation and prescription related to a real disease or an apprehended disease.' ''

There are cases which hold that to constitute a breach of warranty in answers to questions somewhat similar to those contained in the application in this case, it must appear that the consulta-

tion with or attendance by a physician was in relation to some disease or ailment which the applicant had or thought he had. But those are all cases where the form of the question implies that the consultation was in relation to some disease or ailment. That is not this case. Here the obvious and only purpose of the questions contained in Part I of the application was to ascertain when he had last *consulted* a physician, for what *reason*, and the name and address of such physician.

We submit, that in this case, under this contract, the answer to this question was not full, complete and true, where it appears by the undisputed evidence that it had been his custom at frequent intervals, for a number of years, to go to Dr. Phy and subject himself to a thorough examination as to his physical condition.

Moreover, we must not lose sight of the fact that in the proofs of death Dr. Phy swore that he had *prescribed* for deceased at frequent intervals for five years, although his statements in this regard were modified when he came to testify as a witness for plaintiff.

It is held in many of the cases that having consulted a physician for some slight ailment, such as a cold, would constitute a breach of warranty. And the cases are practically unanimous in holding that where the consultation was of such a nature or at so recent a period of time that it must fairly be presumed to have been in the mind of the applicant at the time, his failure to disclose same is a fatal breach.

Take the facts of this case. Here was a man who for years had made it his practice, at frequent intervals, to subject himself to a thorough physical examination by his physician. He was

making application for life assurance. He knew that the first thing and most important thing to the company was to ascertain all of the facts possible as to his health and physical condition and to know the name and address of any physician familiar therewith. It was his duty to give all the facts in his possession. By the terms of the application ,which was the basis of the contract, it was distinctly agreed that the policy should be void if he did not make full, complete and true answers to the questions asked him. When asked: "When did you last consult a physician and for what reason?" Answers: "Do not remember, years ago." Question. "Give name and address of last physician consulted?" No answer. And when the question was put in a different form: "How long since you last consulted or were attended by a physician? Give date." Answers: "Do not remember, long time ago."

How much more essential it was that the company should know the *facts*, should know the name and address of the physician who had made these examinations, should be told where it could get information of the first importance, than that it should know that he had at some time been treated for some purely temporary ailment.

If he had been treated for a broken leg, and had failed to disclose such treatment, it would have been a fatal breach. If he had been prescribed for for some temporary ailment and had failed to disclose such prescription, it would have been a fatal breach. If he had consulted a physician for any disease or ailmen which he had or *thought he had*, and failed to disclose such consultation, it would have been a fatal breach. Of how much greater importance to the company was the information which

he should have given in answer to these questions and which he did not give.

All that was necessary was that he should comply with the terms of his contract; should do as he agreed to do: should make full, true and complete answers to the questions asked him. It was so simple, so easy, why did he not do it? He knew that the validity of the policy was dependent upon his doing it, but still he did not do it.

As was said by the Court of Appeals for the Eighth Circuit in the case of *Webb vs. Security Mut. Life Ins. Co.*, 126 Federal, 635:

"An applicant for a policy of insurance has no right to fence with the truth in answering such an inquiry. He should meet it in good faith and according to its letter and spirit."

In the case of *Brady vs. United Life Insurance Ass'n.*, 60 Federal, 727, the court said:

"A true answer to the inquiry as to the name and address of each physician who had attended the applicant within the past five years would have afforded the assurer a valuable source of information in regard to the previous history and physical condition of the applicant. The inquiry called for the statement of a fact within the knowledge of the applicant, and not for one which might be merely a matter of opinion, in respect to which he might be mistaken. The answer was not incomplete or imperfect, but was untrue. * * * Consequently, the trial judge properly withdrew the case from the consideration of the jury and directed a verdict for the defendant."

The question is, simply: Were the answers to these questions full, complete and true? It is so purely a question of the construction of this particular contract, these particular questions and answers, in view of the undisputed evidence, that further citation of authorities seems almost unnecessary. We beg, however, to call attention to the following:

Caruthers vs. Kansas Mut. Life Ins. Co., 108 Fed., 487.

Metropolitan Life Ins. Co. vs. McTague, 9 Atlantic, 766.

Mutual Life Ins. Co. vs. Arkelger, 36 Pacific, 895.

Providence Svs. Life Ass'n. vs. Reutlinger, 25 S. W., 835.

McClain vs. Provident Svs. Life Ass'n., 105 Fed., 834.

Hubbard vs. Mutual Reserve Fund Life Ass'n., 100 Federal, 719.

When one applies to an insurance company for a policy of insurance; when, as in the case at bar, an insurance company is asked to issue a policy for $10,000 in consideration of a cash premium of $254; that insurance company may lawfully require, as the basis of the contract, a written statement from the applicant and a warranty that the matters therein contained are true; that the answers made to any questions therein contained are full, complete and true, that they are literally true.

An insurance company necessarily does business over a large extent of territory, it necessarily works through a large number of soliciting agents who are paid in commissions on the insurance they solicit. Such companies are frequently subject to fraud and imposition. They have found it necessary to pres-

cribe and limit the powers of their soliciting agents; they have found it essential to their self preservation to require as the basis of the contract a written application from the person seeking insurance, and to make it a condition of the contract that such statement be warranted to be full, complete and true; that for a *limited time* the validity of the policy shall be dependent upon the literal truth of the answers and statements contained in such written application.

It must be borne in mind, however, that it is only for a *limited time* that the validity of the policy is so dependent upon the truth or falsity of said written application. The policy in express terms provides: (Record, p. 157.)

"BENEFITS AND PROVISIONS."

"Incontestability.

X. This policy having been in continuous force from its date of issue, after two full annual premiums have been paid hereon, shall thereafter, under the limitations for provision VI., be incontestable, except for fraud, non-payment of premiums as herein provided, or for misstatement of the age of the assured in the application therefor, subject to the provisions hereof."

Some of our courts have been wont to look with disfavor upon these contracts. The exigency of some particular case has made it hard for the men sitting on the bench to enforce the contract which the parties have made.

In some of our courts it has seemed that an assurance contract was an unclean thing, a thing without the pale of the law; an anomaly, unique in itself, not to be construed, interpreted and

enforced according to its terms, not to be governed by the established rules of law relating to contracts in general, but subject to a distinct law of its own, a law that looked, not so much to the enforcement of the contract which the parties had made, but to finding some loophole through which one of the parties might escape his contract; some means of constructing a new contract, of creating obligations not created by the written contract.

The great majority of our courts, however, have recognized that it was not the business of the courts to avoid contracts, that it was not the province of the courts to create contracts, that it was not the privilege of the courts to give to one at the expense of the other, but that it was the duty of the courts to enforce the contract which the parties had made.

The Supreme Court of the United States, in view of the divergence of decisions, in these cases, undertook the task of straightening things out, of establishing certain rules and principles of law applicable to this kind of contracts. For that purpose it had brought before it the case of *Northern Assurance Company vs. Grand View Building Association*, hereinbefore referred to.

Under the rules there laid down, and under the rules recognized in the great majority of the latter and best reasoned decisions, we submit:

1. The lower court erred in admitting the parol evidence of the witness Stalker as to what was said between him and the deceased at the time the application was made.

2. The admitted facts establish a fatal breach of warranty in relation to "other assurance" held by the applicant at the time the application was made.

3. The undisputed evidence establishes a fatal breach of warranty in the answers to the questions regarding the applicant having consulted a physician.

4. The lower court erred in denying defendant's motion for a directed verdict.

5. The action of the lower court in admitting the parol evidence of the witness Stalker, of itself, necessitates the reversal of the judgment. But more than that. On the admitted facts and undisputed evidence the court should have directed a verdict for the defendant. The judgment should be reversed with directions to the lower court to enter a judgment for defendant.

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